GOLDEN GATE UNIVERSITY School of Law

Environmental Law and Justice Clinic

August 11, 2003

By Facsimile & U.S. Mail

Brenda Cabral
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109
Fax: 415.749.5030

Re: Comments Pursuant to BAAQMD Regulation 2-6-412 on Draft Major Facility Review Permit – Valero Benicia Asphalt Plant – Facility #B3193

Dear Ms. Cabral:

We are writing to comment on behalf of Our Children's Earth ("OCE") pursuant to BAAQMD Regulation 2-6-412, on the Bay Area Air Quality Management District's ("BAAQMD" or the "District") draft Major Facility Review Permit for the Valero Benicia Asphalt Plant – Facility #B3193 ("Valero Asphalt Plant"). We appreciate the opportunity to comment on the permit and the work that the District has done on the draft permit.

OCE is an organization dedicated to protecting the public, especially children, from the health impacts of pollution and other environmental hazards and to improve environmental quality for the public benefit. OCE has numerous members who live and work in the San Francisco Bay Area, including members who live and work in Benicia where the Valero Asphalt Plant is located.

Valero Asphalt Plant's draft Title V permit cannot be finalized in its current form because of deficiencies with the content of the permit including the permit's failure to assure compliance with applicable regulations, the failure to include certain permit requirements, the failure to require sufficient monitoring and recordkeeping, and the insufficiency of the statement of basis that accompanies the permit.

I. Reasonable Intermittent Compliance

A Title V permit must "assure compliance" with all applicable requirements. *See* 40 C.F.R. § 70.1(b). Specifically, 40 C.F.R. § 70.7(a)(1)(iv) provides that a permit may only be issued if "the conditions of the permit provide for compliance with all applicable requirements." The Valero Asphalt Plant Title V permit does not assure compliance.

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First, the District has not provided any information from which the public or U.S. EPA can conclude that Valero Asphalt Plant is currently in compliance with applicable requirements because the review period fails to include the two most recent years of information. The District's 2001 Review of Compliance Record for Valero Asphalt Plant ("Compliance Review"), available at http://www.baaqmd.gov/permit/t5/NOTICES/b3193compliance.pdf (last accessed August 6, 2003), which is the District's sole assessment of Valero Asphalt Plant's compliance, does not include the facility's most recent compliance information, as the report only covers the period between June 15, 2000 and June 15, 2001, with no analysis or mention of *two years* of information. Further, the District's Permit Evaluation and Statement of Basis ("Statement of Basis") cites only the 2001 Compliance Review for its conclusion. *See* Statement of Basis, pp. 15 & 38. No other District review or assessment is mentioned or cited. *See id.* Before issuing the draft permit, the District should have analyzed up-to-date compliance information, without such analysis, the District cannot assure that Valero Asphalt Plant is currently in compliance with applicable requirements.

Second, the language the District uses in the Statement of Basis gives no assurance that the District is using the correct standard to judge compliance. The Statement of Basis asserts that "reasonable intermittent compliance" can be assured at this facility for the review period. *See* Statement of Basis at 15. The District's use of the terms "reasonable" and "intermittent" to modify the term "compliance" is problematic. The term "intermittent" ordinarily means "stopping and starting at intervals" and is synonymous with "occasional, periodic, [and] sporadic." Webster's II New Riverside University Dictionary. Thus, the District's assurance of "intermittent compliance" can only mean noncompliance. The plain language of Title V regulations requires compliance, not "intermittent" compliance.

As to the term "reasonable," it ordinarily means "not extreme or excessive." *Id.* Under the Title V regulations, however, it is insufficient for the District to assure only "non-excessive" compliance. The Title V regulations require the District to place conditions to assure compliance. *See* 40 C.F.R. § 70.1(b). While the type of compliance plan conditions the District includes in a permit may have to be reasonable – i.e., has reasonable basis in fact to address the compliance concerns the District has – it does not follow that Title V regulations require only assurance of "reasonable" compliance.

Third, the District should not rely on a superficial review to assure compliance for the five-year period covered by the Title V permit, particularly given that Valero Asphalt Plant has at least one outstanding Notice of Violation for Parametric Monitoring/Recordkeeping violations (*see* District's Notices of Violation database) and has experienced at least one Incident in the past two months. *See* District's June 25, 2003 Incident Report located at http://www.baaqmd.gov/enf/accemis/I030625.HTM, (last accessed August 6, 2003). We recommend that this analysis at least include information on whether the past violations no longer present concerns of recurring violations in the future, and in the very least be updated to reflect Valero Asphalt Plant's compliance status through August 2003.

Without providing updated information on Valero Asphalt Plant's compliance status or certifying that compliance can be assured rather than "reasonable intermittent compliance," the

draft permit does not assure compliance as required by the Clean Air Act and Title V regulations and cannot be finalized in its current form.

II Regulation 8-2 – Miscellaneous Operations

The purpose of Regulation 8 is to "reduce emissions of precursor organic compounds from miscellaneous operations." BAAQMD Regulation 8-2-101. BAAQMD Regulation 8-2-201 defines "miscellaneous operations" as "[a]ny operation other than those limited by the other Rules of this Regulation 8 and the Rules of Regulation 10." An 'operation' is defined in BAAQMD Regulation 1-219 as "[a]ny physical action resulting in a change in the location, form, or physical properties of a material, or any chemical action resulting in a change of the chemical composition, or chemical or physical properties of a material." This broad definition of "miscellaneous operations" includes the majority or even all processes at the refinery that are not otherwise regulated by other rules in Regulation 8.

The District has nevertheless improperly exempted sources from Regulation 8-2 even if those sources are not governed by other rules in Regulation 8. The Statement of Basis states that it has

> determined that the definition of "miscellaneous operation" in Regulation 8-2-201 excludes sources that are in a source category regulated by another rule in Regulation 8, even if they are exempt from the other rule. This is because such sources [are] limited by the terms of the exemption. Thus, for example, a hydrocarbon storage tank that stores liquids with a vapor pressure less than 0.5 psia is exempt form Regulation 8, Rule 5, Storage of Organic Liquids (8-5-117), and is not subject to Regulation 8, Rule 2, Miscellaneous Operations. The policy justification for this determination is that the Board considered appropriate controls for the source category when it adopted the rule governing that category. Part of the consideration includes determination of sources and activities that are not subject to controls.

See Statement of Basis at 9.

The District's reasoning directly contradicts the plain language of Regulation 8-2, the term "operation" does not mean "facility-wide." Under the District's reasoning, whole parts of the refinery would be exempt merely because a rule in Regulation 8 governs an operation at the refinery. While there are rules under Regulation 8 which govern portions of the refinery (e.g. Regulation 8-5, 8-9, and 8-18), these regulations do not exempt the remainder of refinery operations from Regulation 8-2. Unless specifically exempted by Regulation 8, or governed by another rule in Regulation 8, Regulation 8-2 applies. Further, OCE has been unable find any reference in Regulation 8 rulemaking documents to any District intention to allow exempt sources under rules in Regulation 8 to avoid compliance with the terms of Regulation 8-2's miscellaneous operation requirements.

In addition, the District's determination that the miscellaneous operations rule does not apply to the refineries is inconsistent with District practices. The District has applied the

miscellaneous operation requirements in Regulation 8-2 to sources that are exempt from other rules in Regulation 8. For example, Valero Refining Company – Facility #B2626 applied for Variance relief from Regulation 8-2-301 in early 2003. *See* BAAQMD Hearing Board Docket No. 3491 – Valero Refining Company's Application for Variance and accompanying documents. The District has required similar facilities to comply with the requirements of Regulation 8-2, yet continues to insist that Regulation 8-2 is not an applicable requirement that should be listed in Valero Asphalt Plant's Title V permit.

Further, the District has required a facility to comply with Regulation 8-2 even if individual sources at the facility are covered by source specific rules for that type of facility in Regulation 8. New United Motor Manufacturing Inc. ("NUMMI") is governed by Regulation 8-13, which contains requirements for the emission of precursor organic compounds at Light and Medium Duty Motor Vehicle Assembly Plants. The Title V permit for NUMMI nevertheless requires that sources at the facility to comply with Regulation 8-2 even when those sources are not covered by Regulation 8-13. See NUMMI (Facility #A1438) Major Facility Review Permit, pp. 56, 66, 77, and 163, available at http://www.baaqmd.gov/permit/t5/PERMITS/PROPOSED/A1438.pdf, (last accessed on August 6, 2003).

The District should therefore incorporate the requirements of Regulation 8-2 into the Title V permit for the Valero Asphalt Plant.

III. Failure to Include Adequate Monitoring

Title V regulations require "monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance" and requires all Title V permits to contain "testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit." *See* 40 C.F.R. § 70.6(a)(3), 40 C.F.R. § 70.6(c)(1). BAAQMD Regulation 2-6-409.2 requires that a Title V permit contain "[a]ll applicable requirements for monitoring, recordkeeping and reporting" and allows the District to include "[a]dditional requirements for testing, monitoring, reporting and recordkeeping sufficient to assure compliance with the applicable requirements." BAAQMD Regulation 2-6-409.2 further requires that "[w]here the applicable requirement does not require periodic monitoring or testing the permit shall contain periodic monitoring sufficient to yield reliable data from the relevant time periods that is representative of the source's compliance with the permit."

Notwithstanding these requirements, the District states in the Statement of Basis that

> although Title V calls for a re-examination of all monitoring, there is a presumption that these factors [used by the District to develop monitoring] have been appropriately balanced and incorporated in the District's prior rule development and/or permit issuance It is possible that, where a rule or permit requirement has historically had no monitoring associated with it, *no monitoring may still be appropriate in the Title V permit if, for instance, there is little likelihood of a violation.* Compliance behavior and associated costs of compliance are determined in part by the frequency and nature of associated monitoring requirements. As a result, the District will generally revise the nature or

> frequency of monitoring only when it can support a conclusion that existing monitoring is inadequate.

See Statement of Basis at 18-19 (emphasis added).

The District's determination that, in some cases, requiring monitoring is inappropriate is in direct contradiction of the mandate of Title V of the Clean Air Act, which requires a Title V permit to contain monitoring sufficient to assure compliance. *See* 42 U.S.C. § 7661c(c). Further, the District's presumption that the existing monitoring is "adequate to provide a reasonable assurance of compliance" is not authorized by either Title V or by BAAQMD Regulation 2-6-503. *See* Statement of Basis at 19. Title V specifically requires the imposition of new monitoring to assure compliance with permit conditions. In many cases, imposing new monitoring is the only way the District will be able to assure compliance with applicable requirements. Yet the District, while recognizing that Title V calls for "re-examination of all monitoring," seems to rely on existing monitoring requirements for many sources. For example, rather than upgrade insufficient monitoring, the District relies on the existing monitoring for sources S-19, S-20, and S-21, which is not continuous, even though these sources are considered in the calculation of the refinerywide emission rate for NOx under BAAQMD Regulation 9-10 for both the Valero Asphalt Plant and the Valero Refinery - #B2626. *See* Statement of Basis at 9-10. The District should upgrade the monitoring for sources S-19, S-20, and S-21 to continuous as allowed under BAAQMD Regulation 2-6-503.

Until adequate monitoring is incorporated into Valero Asphalt Plant's draft Title V permit, the permit should not be finalized in its current form.

IV. Inadequate Statement of Basis

The purpose of a Title V permit is to improve compliance with and enforcement of the Clean Air Act. *See* 57 Fed. Reg. 32250, 32251 (July 21, 1992). To achieve this purpose, Title V permits record in one document all of the air pollution control requirements that apply to the source. *Id.* A Title V permit is meant to give members of the public, regulators, and the facility a clear picture of what the facility is required to do to comply with the law. According to 40 C.F.R. § 70.7(a)(5), every Title V draft permit must be accompanied by a "statement that sets forth the legal and factual basis for the draft permit conditions." While we commend the District for providing a Statement of Basis for the Valero Asphalt Plant Title V permit, and for continuing to include the necessary detail, we still find that the Statement of Basis does not provide the information required by Title V. *See* 40 C.F.R. § 70.7(a)(5); *see also* letter from Stephen Rothblatt, Air Programs Branch, U.S. EPA to Robert F. Hodanbosi, Chief, Ohio Environmental Protection Agency, available at http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/sbguide.pdf.

For example, the District merely lists changes to Valero Asphalt Plant's previous draft permit with little or no explanation. Further, the Statement of Basis fails to provide the legal or factual basis for changes to emission limits for S-19, and merely cites to Appendix C to the

Statement of Basis where Permit Evaluations were supposed to be attached, but which were not provided with the Statement of Basis. *See* Statement of Basis at 42.

Until the Statement of Basis is improved to comply with Title V, the Title V permit for the Valero Asphalt Plant fails to meet Part 70 requirements and the permit should not be finalized in its current form.

V. Lack of Reporting

The permit fails to include proper reporting requirements into a number of permit conditions. In many places in the permit, the District requires the refinery to maintain logs at the facility for five years.[1] However, the District fails to require the data collected in these logs to be reported every six months as required by Title V. *See* 40 C.F.R. §§ 70.6(a)(3)(i)(B) & 70.6(a)(3)(iii)(A). The District states in numerous permit conditions that these logs "shall be kept on site and made available to District staff upon request." *See* examples in footnote 1. Without requiring that the data kept in the logs be reported to the District every six months, the permit condition language does not comply with Title V requirements. The District should include the semi-annual reporting requirement in each place in the permit where the permit requires the facility to make the log "available to District staff upon request."[2]

The District's failure to include semi-annual reporting requirements exists throughout the permit. The permit consistently requires the refinery to maintain records at the facility, but does not require those records to be regularly submitted to the District. This defeats one of the central purposes of Title V. Title V was created to allow the public the ability to review whether a facility was in compliance with all permit terms and conditions. If records are maintained solely at the facility, the public will have no ready access to them. Thus, for example, the District's responses to a Public Records Act request will surely be delayed while the District seeks the documents from the permittee. Without ready access to compliance information, the public is left without access to information specifically required by Title V. *See* 40 C.F.R. § 70.6(a)(3)(iii)(A).

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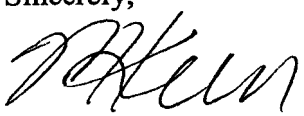
[1] See, e.g. Condition 1240.I.4, Title V Permit, p. 143; Condition 1240.I.13, Title V Permit at 144; Condition 1240.I.19b, Title V Permit at 148; Condition 1240.II.13, Title V Permit at 150; Condition 1240.II.22, Title V Permit at 151; Condition 1240.II.23, Title V Permit at 152; Condition 1240.II.29, Title V Permit at 151; Condition 1240.II.31a, Title V Permit at 153; Condition 1240.II.34, Title V Permit at 155; Condition 1240.II.46, Title V Permit at 156; Condition 1240.II.58, Title V Permit at 159; Condition 1240.II.58d, Title V Permit at 161; Condition 1240.II.75, Title V Permit at 1163-4; Condition 1240.II.91a, Title V Permit at 165; Condition 1240.II.92a, Title V Permit at 166; Condition 20278.6, Title V Permit at 171; Condition 19329.*4, Title V Permit at 172; Condition 20617.11, Title V Permit at 175-6.

[2] If the District is concerned about the logistics or maintaining voluminous reporting documents, electronic reporting would easily address the concern, and the public would welcome such electronic reporting.

VI. Conclusion

For the forgoing reasons the Title V permit for the Valero Asphalt Plant should not be finalized in its current form. Thank you for this opportunity to submit public comments. If you have any questions please call Marcie Keever at 415-369-5351.

Sincerely,



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cc: Edward Pike, U.S. EPA Region 9